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MUTUALITY OF OPTIONS

IN spite of the fact that options, so-called, have been in use for many years, it is surprising to find that the law is still somewhat unsettled, and that courts frequently express doubts as to their validity at this late day.

The main difficulty with this form of contract seems to be an apparent lack of mutuality, and even when sustained, they have, in many cases, been treated as exceptions to the rule that mutuality must be present in all contracts.

Rarely any purchase of land can be made without employing some device of this kind, for even though the vendor is fully decided to sell at a given price, and the vendee to purchase at the vendor's price, many details remain to be settled concerning title, taxes, terms of payment and method of transfer, in which case the option fully fills the want. But when, in addition to all these conditions, it is necessary before the vendee can accept that an investigation be made to determine such questions as the presence and quantity of ore and minerals, the quantity or quality of timber on the land, or the nature of its soil, the inability to rely on an agreement giving the vendee an opportunity to investigate, seriously handicaps the transfer of property, and if in addition the vendee has paid the vendor a substantial sum for the option, or expended time, labor and money in investigating, the failure to sustain such an agreement is in the nature of a reward to break one's word.

Where feasible, because of this doubt as to the validity of these agreements, vendees have converted such options into conditional contracts wherein they accept the land provided it shows certain definite and fixed qualities (in timber land, provided it shows a certain number of feet of merchantable timber): but the instances where this may be done are very few, and business men hesitate to bind themselves to take a piece of property wherein they will have to determine unknown conditions in advance.

As the law stands, one is not absolutely safe at the present day in advising his clients that an option to purchase land, although based upon consideration, is of much value.

It is well known, if one may be pardoned for referring to it, that every contract is based, among other things, upon an offer and an acceptance, and much thought has been spent upon this phase of the subject of contracts, for chameleon-like, it presents itself in a multiplicity of colors and shades.

At first blush one would say there could be no possibility of difficulty in stating, where the other elements going to make a contract are present, if A makes an offer and B accepts, that the contract is complete, but a glance at the numerous decisions shows that offers and acceptances are not always simple.

Laying aside the well known treatment of this subject by Anson in his work on contracts, wherein he subdivides the process of offer into

1. The offer of a promise for assent;
2. The offer of an act for the promise;
3. The offer of a promise for an act;
4. The offer of a promise for a promise;

we find many difficult questions arising where the offer is communicated by a person at a distance from another, and where there may be a delay of several days before the offer reaches its destination and must be accepted, and in a similar manner there must be a delay in the communication of the acceptance.

We also have that troublesome class of cases where a definite offer is made and the acceptor, while really accepting the offer, has failed to create a contract because he did not meet that element of the offer which required a reciprocal promise, that is to say,—there is a failure of mutuality.

And again, there is that class of cases where the offer is by express agreement a continuing offer, such as a bid at an auction sale, or the subject here under discussion, the option to purchase land or other property.

Then, too, an offer may sometimes be complex, for it may consist of more than the mere offer of an act or a promise. It may be a combination of the two, an act and a promise, or two or more promises or acts.

If A writes B offering to employ him for three years at X salary per year, and B merely accepts by parol, but is discharged at the end of the year, it has been held that this agreement is not mutual for the reason that B did not promise to work at X salary for three years, and that B therefore had no remedy for his wrongful discharge. Here we have the offer of two promises by A. A promise to pay X salary, and a promise to employ for three years. An acceptance of the promise to pay would support an action to recover for services rendered, but to recover damage for loss of employment there must be proof of a reciprocal promise to work for three years.¹

Again, there may be trouble in determining at times which of two

¹ *Wilkinson v. Heavenrich* (1886), 58 Mich. 574.

parties to a contract is the offeror, and which the offeree. Is the bidder at the auction sale or the person selling the offeror?

Contracts are also viewed as executed and executory.

An executed contract is one wholly performed, or in which there remains nothing to be done. It must not be confused with executed consideration, for the latter is only one element in the contract.

An executory contract, on the other hand, is one wholly or partially unperformed, or in which there remains something to be done on either or both sides.

Broadly speaking, the acceptance of an offer, while it is in force, completes the contract, for it changes the offer into a binding promise and it may not be revoked thereafter. Before acceptance, on the other hand, if the offer is not under seal and not based on consideration, it may be revoked at any time. Thus, the bidder at an auction sale may withdraw his offer at any time before the fall of the hammer.²

But a policy of marine insurance which had been signed, sealed and delivered by the insurer, but not accepted by the insured until loss occurred, may not be revoked.³

This latter rule as to sealed instruments is due entirely to the peculiar form of the offer, and grows out of the fact that the seal imports that the offer contained in the deed is based on consideration.

It has also been stated as a general rule that where an offer is a continuing offer, as in the case of the option, that if it is based on consideration it may not be revoked.⁴

Notwithstanding this very general statement of this proposition and the cases cited in support thereof, we frequently find the courts going astray, and few decisions can be found which have fairly and squarely decided the question on correct reasoning.

Reference in many American cases is made to English cases, and among others the following are most frequently cited:

(1) *Bell v. Howard* (1742), 9 Mod. 302, 88 Eng. Reprint, 467; (2) *Cooke v. Oxley* (1790), 3 T. R. 653; (3) *Green v. Low* (1856), 22 Beav. 625; (4) *Dickinson v. Dodds* (1876), L. R. 2 Ch. D. 463.

Bell v. Howard was an action to specifically enforce an optional agreement involving the sale of an advowson. Although the court refers to the agreement which was made by the vendor in consideration of the sum of one guinea as not mutual, it bases its decision upon the fact that the vendor was not in a state of health and mind to be competent to make an agreement of that kind, and further

² *Paine v. Cave*, 3 Term R. 148.

³ *Xenos v. Wickham*, L. R. 2 H. L. 96, 36 L. J. C. P. 313, 16 L. T. Rep. (N. S.) 800.

⁴ 9 Cyc. 286; 21 Am. & Eng. Ency of Law. Ed. 2, 929.

advert to the impossibility of the vendor making a good title. Furthermore, the court says that plaintiff must be left to his remedy at law against the heir of the vendor, if there be assets, for the covenant charges the heir.

Cooke v. Oxley was a case growing out of an offer to sell tobacco for a stipulated price, and to keep the offer open until four o'clock of that day. In his declaration Cooke averred that he accepted by four o'clock, but Oxley refused to deliver. The court held that the promise to keep the offer open was not binding for want of consideration, and that there was no proof of a promise continuing until or existing at four o'clock.

Dickinson v. Dodds was a suit for specific performance of the following instrument:

"I hereby agree to sell to Mr. George Dickinson the whole of the dwelling house, garden, ground, stabling and outbuildings thereto belonging, situated at Croft, belonging to me for the sum of 800 pounds, as witness my hand this 10th day of June, 1874. Signed, JOHN DODDS.

P. S.—This offer to be left over until Friday, nine o'clock, A. D. J. D. the twelfth (12th) June, 1874.

Signed, J. DODDS."

On June 11th, Dodds sold to a third person. Dickinson was informed of the sale by still another, although unauthorized, person, but nevertheless, knowing the fact of the sale and within the time limit, gave notice of his acceptance to Dodds. The Court of Appeal held that there was no contract because of the fact that the offer did not continue up to the time of the acceptance.

In discussing these cases under the subject of revocation of an offer, one writer treats them as in conflict with the rule that revocation of an offer is not communicated unless brought to the notice of the offeree as settled in *Byrne v. Van Tienhoven*, 5 C. P. D. 344, and of *Cooke v. Oxley*, states that it was not argued on the true ground, in that the declaration correctly sets forth an offer turned into a contract by acceptance at 4 P. M. while the argument to the court set up an actual sale of property, if Cooke chose to declare himself a buyer before 4 o'clock, and, as a result, the court was asked to decide that although Cooke was not bound to buy, nevertheless Oxley was bound to sell if required.

The case has been further criticized as not being correctly reported and as having been overruled.⁵

⁵ Boston, etc., *R. v. Bartlett*, 3 Cush. (Mass.) 224; Anson, *Contracts* (Huffcut's Ed.), p. 33; 2 Street, *Foundations of Legal Liability* 54.

In this connection, contracts, it may be suggested, are frequently spoken of as unilateral and bilateral.

A unilateral contract is one in which there is a promise on one side, the consideration on the other having been executed. The shipment of goods by a merchant in response to an order, the performance of work by a person in response to an order constitute these unilateral contracts.⁶

There is considerable laxity in the profession in the use of the word "unilateral," and it is not always thus defined. It is frequently used and applied to options or "one-sided" contracts, and agreements void for want of mutuality.⁷

A bilateral contract is one in which there are mutual promises. Promises to marry; subscriptions to common enterprises; an order of goods and its acceptance and promise to deliver, afford common illustrations of such a contract.

What the court, in *Cooke v. Oxley*, tried to do, was to construe a bilateral contract as an imperfect unilateral engagement, for the moment Cooke accepted Oxley's unrevoked offer and promise, the elements of a bilateral contract were present. Had there been consideration for Oxley's promise, there must have resulted an executory unilateral contract, an element not present nor claimed.

One author, speaking of *Dickinson v. Dodds*, states that it is only disputed authority for the proposition that notice of revocation from any source is sufficient, and that the statement of the court that there is neither principle nor authority for the proposition that there must be actual and express withdrawal of the offer, is incorrect.⁸

He further states this suppositive case:

"M offers to sell a specific thing to A, and while his offer is yet open for acceptance, he actually sells to X. A accepts within reasonable or the prescribed time. Clearly M cannot sell the same thing to two different persons, and clearly, also, he is under liability to two different persons. A may not be able to enforce a performance of the contract, but he is at any rate entitled to damages for its breach."

In so far as *Cooke v. Oxley* and *Dickinson v. Dodds* decided that

⁶ 2 Street, Foundations, etc. 52.

⁷ Pomeroy, Contracts, 387; *Johnston v. Trippe* (1887), 33 Fed. 535; *Barrett v. McAllister* (1890), 33 W. Va. 728, 11 S. E. 224; Fry, Specific Performance, 207; *Graybill v. Braugh* (1893), 89 Va. 895, 17 S. E. 558, 21 L. R. A. 133; *Chadsey v. Condley* (1900), 62 Kan. 853, 62 Pac. 663; *Hayes v. O'Brien* (1894), 149 Ill. 403, 37 N. E. 73, 25 L. R. A. 555.

⁸ Anson, Contracts (Huffcut's Ed.) 34.

notice of revocation is not necessary, they have been overruled, for it has been since decided that one who has received an offer is entitled to actual notice of revocation before he has completed any act of acceptance and such notice cannot be made to relate back to the date of dispatch.⁹

Green v. Low,¹⁰ although not entirely in point, is interesting. An agreement was made between an owner of land and a proposed lessee whereby the owner stipulated if the lessee would make certain improvements and effect certain insurance on the property that he might have a lease for ninety-nine years, but in case of failure so to do, the agreement to execute a lease should be void. The agreement also contained a clause giving the lessee an option to purchase the property at any time within two years at a named price. The lessee made the improvements, but failed to effect the insurance as agreed. He, however, accepted the option and tendered the price within the prescribed time. It was held that the contract for a lease was independent of the option to purchase, and notwithstanding the fact that the agreement to lease had been rendered void, the option still subsisted and might be enforced.

The following Irish case is also frequently cited.¹¹ The action was a bill to specifically enforce an agreement by Butler to give a ninety-nine year lease of premises which he held under a settlement, and while there was discussion of the lack of mutuality of the agreement, the court placed its decision more on the ground that under the settlement Butler could not give such a lease and therefore the agreement was made and signed in mistake.

In America a multitude of cases has been decided involving one phase or another of this question.

Cases have sustained options in leases and in agreements under seal and specifically enforced them;¹² other cases have sustained an option based on consideration and compelled third persons who had

⁹ *Byrne v. Van Tienhoven* (1880), 5 C. P. D. 344; *Stevenson v. McLean* (1880), 5 Q. B. D. 346.

¹⁰ 22 Beav. 625.

¹¹ *Lawrenson v. Butler* (1802), 1 Sch. & Lef. 20.

¹² 9 Cyc. 288, and cases cited; 21 Am. & Eng. Encyc. Law 928, cases cited; *De Rutte v. Muldrow* (1860), 16 Cal. 505, *Coles v. Peck* (1884), 96 Ind. 333, *Linn v. McLean* (1885), 80 Ala. 360, *Souffrain v. McDonald* (1868), 27 Ind. 269, *Hall v. Carter* (1870), 40 Cal. 63; *Herman v. Babcock* (1885), 103 Ind. 461, 3 N. E. 73; *House v. Jackson* (1893), 24 Ore. 89, 32 Pac. 1025; *Carter v. Love* (1903), 206 Ill. 310, 69 N. E. 85; *Tibbs v. Zirkle* (1904), W. Va., 46 S. E. 701; *Frank v. Stratford* (1904), Wyo. 77 Pac. 134; *Watkins v. Robertson* (1906), Va. 54 S. E. 33; *Pittsburg Co. v. Bailey* (1907), Kan. 90 Pac. 803.

purchased with notice to convey to vendee;¹³ others hold that \$1.00 or a merely nominal consideration, or loss of time and expense, is not a sufficient consideration, or that a seal does not import consideration;¹⁴ others have sustained options based on a nominal consideration.¹⁵

One of the early American cases which is most frequently cited is that of *Clason v. Bailey*, decided by Chancellor KENT in 1817.¹⁶ The case involved the sale of personal property, and was an action brought by the vendors to recover a loss for the refusal of the vendee to fulfill the contract. The decision involved the interpretation of the statute of frauds, it being claimed, among other objections, that the contract was within the statute in that it was not signed by the vendors. The court, on the authority of numerous cases, decided that this was not necessary inasmuch as the contract was signed by the party whom it was sought to charge.

In the course of the opinion, however, the Chancellor entered upon a discussion of the question of mutuality of these contracts, and practically says that were it not for the numerous decisions to the contrary he would feel constrained to hold the contract void for want of mutuality, evidently forgetting that there was a mutual or valid bilateral contract in parol (thus confusing remedial with substantive law), and that were it not for the Statute of Frauds no question could arise.

After quoting approvingly the observation of LORD REDESDALE in *Lawrenson v. Butler*,¹⁷ to the effect that

"The contract ought to be mutual to be binding, that if one party could not enforce it the other ought not to. To decree performance when one party only was bound would make the statute really a statute of frauds, for it would enable any person who had procured another to sign an

¹³ *Mansfield v. Hodgdon* (1888), 147 Mass. 304; *Ross v. Parks* (1890), 93 Ala. 153, 8 South. 368; *Barrett v. McAllister* (1890), 33 W. Va. 220, 11 S. E. 738; *Cummins v. Beavers* (1904), — Va. —, 48 S. E. 891.

¹⁴ *Gordon v. Darnell* (1880), 5 Colo. 302; *Smith v. Reynolds* (1880), 8 Fed. 696; *Graybill v. Braugh* (1893), 89 Va. 895, 17 S. E. 558, 21 L. R. A. 133; *Davis v. Petty* (1898), 147 Mo. 374, 48 S. W. 944; *Guyer v. Warren* (1898), 175 Ill. 528, 51 N. E. 580; *Carter v. Love* (1903), 206 Ill. 310, 69 N. E. 85; *Wallace v. Figone* (1904), — Mo. App. —, 81 S. W. 492; *Comstock Bros. v. North* (1906), — Miss. —, 41 South. 374; *Kirby Carpenter Co. v. Burnett* (1906), 144 Fed. 635; *Murphy, etc., Co. v. Reid* (1907), — Ky. —, 101 S. W. 964.

¹⁵ *Ross v. Parks* (1890), 93 Ala. 153, 8 South. 368; *Seyforth v. Groves, etc., R. Co.* (1905), 217 Ill. 483, 75 N. E. 522.

¹⁶ 14 Johns. 485.

¹⁷ (1802) 1 Sch. & Lef. 20.

agreement to make it depend on his own will and pleasure whether it should be his agreement or not,"

and other English decisions, the Chancellor concludes that notwithstanding this objection, it appears from a review of the cases that the point is too well settled to be a new question.

This language has led to considerable confusion, for we later find courts citing *Clason v. Bailey* as an authority for enforcing agreements which might now be construed as lacking mutuality, quite a different proposition from the one involved in that case.

In 1831 we find Vice Chancellor McCOUN reasoning as follows:

"In the next place it is said the covenant to sell is not mutual, the lessee not being bound to purchase, and that as this is a one-sided agreement the court will not decree a specific performance. The cases of *Parkhurst v. Van Courtlandt*, 1 Johns. Ch. 282, and *Benedict v. Lynch*, Id. 370, have been referred to as establishing this point. Chancellor KENT there intimated that such was the rule, but in a subsequent case in the court of errors (*Clason v. Bailey*) he had occasion to review that opinion, which he found to be erroneous, and admits that the point is too well settled the other way to be questioned. The court may, therefore, in the proper case, where there is a covenant on one side and no mutuality, decree a performance."

In the case under decision there was a lease containing a covenant giving the lessee the option to purchase at a specified price the premises leased, and this the court by its decision specifically enforced.¹⁸

The decision was undoubtedly correct, but here too the contract did not lack mutuality. There was a continuing offer based on consideration which could not be and was not revoked and which had been accepted, and an offer made to pay the purchase price.

Again, in a Maine case frequently cited to sustain options, we find this opinion of Chancellor KENT quoted approvingly. The option involved in the case was not, however, specifically enforced.¹⁹

Another decision frequently cited is the following from the Supreme Court of Massachusetts:

Bill for specific performance of a contract in writing to sell and convey land, if the vendee would take the same within 30 days for the sum of \$20,000; no considera-

¹⁸ *In re Hunter* (1831), 1 Edw. Ch. 1.

¹⁹ *Rogers v. Saunders* (1839), 16 Me. 92, 33 Am. Dec. 635; *Clason v. Bailey* is also cited approvingly in *Johnston v. Trippe* (1887), 33 Fed. 530.

tion for the time; the vendee elected to take the land within the prescribed time and while the offer was unrevoked, and notified the vendor of his election and offer to pay the price and requested a conveyance by the vendor, which was refused.

The court held that the offer was a continuing offer which might have been revoked at any time before acceptance, but not having been revoked and having been accepted, the offer ripened into a contract which was specifically enforceable. The decision further criticizes *Cooke v. Oxley*.²⁰

Let us now turn to more recent decisions. It has been decided in Kentucky,²¹ and the case is frequently cited, that where, in consideration of the sum of one dollar, the owner agreed to sell and convey certain lands at a given price, and gave a fixed time to explore for metals and minerals, such an agreement was nudum pactum because there was no legal obligation upon each side to perform; that is, it lacked mutuality, and the court therefore refused to enforce specifically, although the vendee accepted within the time limited. The option apparently was unrevoked.

The court suggests, however, that if such an option be based on sufficient consideration, which may consist, of course, either in advantage to one party, or disadvantage to another, then it is enforceable. The consideration named, to-wit, One Dollar, was deemed to be a merely nominal consideration, but whether there had been expense and disadvantage to the vendee in digging and exploring for metals and minerals, the opinion does not state.

In *Cameron v. Shumway*,²² which cites approvingly *Litz v. Goosling*, the Supreme Court of Michigan properly, under the facts in the case, avoided a decision as to the validity of an option wherein this language was used:

"For and in consideration of One Dollar to me in hand paid, the receipt whereof is hereby acknowledged, I hereby give to Frank H. Hendrick an option to July 1, 1904, to purchase of me, for the sum of \$2,500, the following described property: * * * Also, agree to furnish abstract of said property showing perfect title. Dated, Lansing, Mich., May 10, 1904. F. W. Shumway."

On June 28, 1904, presumably on account of the inability of the

²⁰ (1849) *Boston & Maine Railroad v. Babcock*, 3 Cush. 224.

²¹ *Litz v. Goosling* (1892), 93 Ky. 185, 21 L. R. A. 127.

²² (1907) 149 Mich. 634.

vendee to carry out this option, a second option, with these additional words, passed between the same parties:

"The said \$200 is to be applied on the purchase price so that only \$2,300 is to be paid on or before September 1, 1904, but when said balance is paid, a warranty deed of said property is to be given and an abstract to date of transfer furnished, showing perfect title; also a tax history is to be furnished. Signed, F. W. Shumway."

September 8, 1904, the following endorsement was made:

"For and in consideration of the sum of \$200 to me in hand paid, I do hereby extend the above option to December 1, 1904, at which time the balance of \$2,100 will be due. Dated, Lansing, Mich., September 8, 1904. F. W. Shumway."

Later, a second endorsement was made as follows:

"For a valuable consideration, I do hereby sell, assign and transfer all my right, title and interest in the within optional contract to Lowry Cameron. Dated, Lansing, Mich., November 28, 1904. Frank H. Hendrick."

From the report of this case, which is an action to specifically enforce the option, neither Hendrick nor his assignee ever accepted the option in writing before December 1, 1904.

The assignee did, however, state that he was ready to pay over the balance, namely, \$2,100, upon a warranty deed and an abstract and tax history being furnished.

In commenting upon the case, the court uses this language:

"The papers which have been signed by the defendant did not bind Mr. Hendrick to accept the option, and when he failed to do so, on or before December 1, 1904, the defendant had no remedy."

It further says the assignee acquired the same right and was subject to no other liability, and because he insisted upon a warranty deed and an abstract and tax history being furnished, before paying the balance, he failed to comply with the option, therefore the vendor was held not bound.

The decision of the court was undoubtedly correct, but in quoting from an Iowa case, it uses language that will certainly breed trouble for persons purchasing real estate in Michigan and elsewhere.

The case referred to is *Myers v. Stone*,²³ and the language quoted is as follows:

"Generally an option may be defined as a contract by which the owner agrees with another person that he shall have the privilege of buying his property at a fixed price within a limited time. It is neither a sale of land nor an agreement to sell, but merely the disposal of a privilege of electing to buy at a fixed price within the time limited. The other party acquired no lands nor interest in land, *not even a chose in action* prior to his election, but he does obtain what is often of much value, the privilege at his election to demand and receive the conveyance of land."

A further examination of this latter case indicates that it was an action by a plaintiff lessor to forfeit or set aside a lease of farming land which also included the right to mine coal, and contained an option giving the lessee, but no other person, the option to purchase the premises at a fixed price within a specified time. The lessee assigned to defendants, and the court held that the option, being the personal privilege of the lessee, was not assignable and did not inure to the assignee.

In its decision the Iowa court also uses this language concerning an option:

"The person holding the right to an option is not a purchaser. He becomes such only by exercising his right of option, and not until he becomes a purchaser does he *acquire anything which a court of law or equity can recognize*. We do not think, indeed, if the holder of the option had nothing more than a mere right of option not exercised, that it would have been claimed that he had anything that could be sold upon execution."

The court goes on to say:

"Let the holder exercise his option, however, and apparently he does acquire all the attributes of a purchaser."

We are rapidly learning in these decisions what an option is not:

1. It is not a sale of land.
2. It is not an agreement to sell.
3. Its holder is not a purchaser.
4. Its holder has no rights at law or in equity.
5. It is not a chose in action.
6. It may not be levied upon by execution.

²³ (1905) 128 Iowa 10, 102 N. W. 507.

It is, however, a "privilege of election," and strange to say, "it is a contract." Curiously enough, too, the court now quotes with approval *Ide v. Leizer*²⁴ as authority for its definition of an option, viz.:

"An option may be defined as a contract by which an owner agrees with another person that he shall have the privilege of buying his property at a fixed price within a specified time."

Let us now examine the Montana decision.

This case is interesting for the reason that the opinion, although not necessarily involving a decision of the question under discussion, is exceedingly favorable to the theory that a vendor may not revoke an option based on consideration before the time limited has expired, and that a vendee does acquire valuable rights before acceptance. The action is a bill for specific performance of the following agreement in writing:

"For and in consideration of One Dollar to me in hand paid, I hereby agree to give Frank L. Ide the sole right and option to purchase from me at any time within ten days from the date of this instrument, the following described property, to-wit: * * * I furthermore agree to furnish a good and sufficient deed of conveyance of said property and of the whole thereof. Price of said property to be \$1,000. Dated, Helena, Montana, September 24, 1889. J. J. Leiser."

"I hereby extend the above option for a period of ten days from this date. Helena, Montana, October 3, 1889. J. J. Leiser."

On October 11, a tender of \$1,000 was made, but the vendor refused to deed, and the court decreed specific performance.

In discussing these agreements, the court treats them as two separate options and states that in dealing with property there may be

1. A sale of lands;
2. An agreement to sell lands;
3. What is popularly called an option.

The latter is neither a sale nor an agreement to sell. It is simply a contract by which the owner of property agrees with another person that he shall have the right to buy his property at a fixed price

²⁴ (1890) 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17.

within a time certain. He does not sell his land, he does not then agree to sell it, but he does sell something, namely, the right or privilege to buy at the election or option of the other party. The second party gets in praesenti, not lands, or an agreement that he shall have lands, but he does get something of value, namely, the right to call for and receive lands if he elects. It is an executed agreement. That, although, in the case at bar, there was no consideration for the assignment which constituted the second option, and it could have been nullified at any time, for it was merely an offer, nevertheless, not having withdrawn the offer, the vendor was too late in withdrawing it after the price had been tendered, and implies that the first option, being based on a sufficient consideration, was not merely an offer, but an executed agreement and could not be revoked.

Couch v. McCoy,²⁵ while not decisive of the question here under discussion, is one of the few cases which seem to grasp this distinction. The action was a bill to specifically enforce an option to purchase land, but because of the fact that there was no consideration for the sixty days granted in the option, it was held that it might not be enforced. The court, however, uses this language in the course of its opinion:

"It is then manifest that an offer of an option until accepted according to its terms is no more binding than an offer of sale without consideration, and may be withdrawn unless prior to such withdrawal it be so accepted. There are then two elements in every option contract. First—the offer to sell, which does not become a contract unless and until accepted according to its terms, and, second—the completed contract to leave the offer open for a specified time, and this in order to become a completed contract must be for some consideration deemed valuable in the law."

In conclusion, it was stated early in the paper that under the present current of authorities there was considerable doubt as to the validity of options. The reason for the statement depends not so much upon decisions adverse to options, as upon the fact that the favorable decisions have invariably treated them as exceptions to the rule requiring mutuality, and with the modern and correct tendency of courts to insist that contracts must be mutual there will presently be found courts that will refuse to sustain the option

²⁵ (1905) 138 Fed. 696.

because of its apparent lack of this element unless the view herein suggested is adopted.

If we were to analyze the processes in the formation of the following option: A offers to sell land at X price, and gives B ten days to refuse or accept, and B pays A, Z dollars for the refusal, we would find the following elements of the contract:

1. A's offer to sell land at X price is the offer of an act;
2. A's acceptance of Z dollars from B is the acceptance of the offer of an act;
3. A's promise to withhold lands is the offer of a promise, and B's acceptance.

We have thus on the part of A:

1. The offer of an act;
2. The offer of a promise;
3. The acceptance of an act.

And, on the part of B:

1. The offer of an act;
2. The acceptance of a promise.

The difficulty appears to have been that the lack of mutuality involved in these agreements is more apparent than real, and that courts have sometimes been impressed more with one contractual phase of the option than the other, for an option is really a compound contract.

They have seen merely that element wherein A has agreed to sell his land for X dollars, and B has not agreed to accept it, and have overlooked the promise to withhold its acceptance and the consideration for the promise.

It would seem on principle, then, that there ought to be no doubt that the vendee in an option does acquire a chose in action, and that he ought to have not merely the right of specifically enforcing such a contract, but in the event that the vendor has placed it beyond his power to convey the lands by disposing of them to innocent third parties, that the vendee should have a right of action against the vendor for his damages, and that these damages should not be limited merely to the consideration for the option.

The law is not well settled as to the measure of damages where vendees have sought their remedy at law, for the reason that there is a dearth of cases due to the fact that most persons have chosen when their options would permit to seek their remedy in equity, or

have abandoned their cases because of inability to show damage or to collect from the vendor if damages were recovered.²⁶

So, too, if the option based on a valuable consideration creates a legal right, one has much difficulty in giving reasons why disadvantage to the vendee as well as advantage to the vendor should not be a consideration for such an agreement.²⁷

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²⁶ The following cases decide that damages may be recovered: *Dambmann v. Rittler*, 70 Md. 380, 14 Am. St. R. 364; *Congregation, etc. v. Gerbert*, 57 N. J. L. 395; *Yerkes v. Richards*, 153 Pa. St. 646, 34 Am. St. Rep. 721; *Grabenherst v. Nicodemus*, 42 Md. 263; *Goodpaster v. Porter*, 11 Ia. 161.

²⁷ The following cases have sustained an option based on a valuable consideration other than money: *Bradford v. Foster* (1888), 87 Tenn. 4, 9 S. W. 195; *Clarno v. Grayson*, 30 Ore. 111, 40 Pac. 426.